

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

JOSE A. ORTIZ, ) Case No. CV 18-03382-RGK (AS)  
Petitioner, )  
 ) **ORDER OF DISMISSAL**  
 )  
 )  
 )  
v. )  
 )  
 )  
STU SHERMAN, Warden, )  
 )  
Respondent. )  
)

## **BACKGROUND**

21 On April 9, 2018, Jose A. Ortiz ("Petitioner"), a California  
22 state prisoner proceeding pro se, filed a "Motion to Accept Hand  
23 Written Appeal of This Habeas Corpus" (Docket Entry No. 1), which  
24 the Court construes as a Petition for Writ of Habeas Corpus by a  
25 Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition").  
26 Petitioner challenges his 2012 convictions, in the Los Angeles  
27 County Superior Court (Case No. BA386275), for forcible lewd act  
28 upon a child, continuous sexual abuse of a child, forcible rape,

1 and lewd acts upon a child.<sup>1</sup> The Petition alleges the following  
2 grounds for habeas relief: (1) There was insufficient evidence to  
3 support the convictions; (2) The prosecutor committed misconduct  
4 during closing argument in two separate respects; and (3)  
5 Petitioner received ineffective assistance of counsel based on his  
6 trial counsel's failure to object to the prosecutor's misconduct  
7 during closing argument. (Petition at 1-11).

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9 On August 27, 2014, Petitioner filed a Petition for Writ of  
10 Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C.  
11 § 2254. See Jose A. Ortiz v. Stu Sherman, Case No. CV 14-06721-  
12 RGK (AS); Docket Entry No. 1 ("Prior habeas action"). On  
13 September 15, 2015, the district court issued an Order and  
14 Judgment denying that habeas petition and dismissing the petition  
15 with prejudice, in accordance with the findings and conclusions  
16 of the Magistrate Judge. (Id.; Docket Entry Nos. 22, 26-27). On  
17 the same date, the district court denied Petitioner a Certificate  
18 of Appealability. (Id.; Docket Entry No. 28). On December 22,  
19 2015, the Ninth Circuit Court of Appeals dismissed Petitioner's  
20 appeal of the district court's order for failure to prosecute.  
21 (Id.; Docket Entry No. 33).

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23 **DISCUSSION**

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25 The Antiterrorism and Effective Death Penalty Act of 1996

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27 <sup>1</sup> The Court takes judicial notice of the pleadings in  
Jose A. Ortiz v. Stu Sherman, Case No. CV 14-06721-RGK (AS).

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1 ("AEDPA"), enacted on April 24, 1996, provides in pertinent part  
2 that:

3                 (a) No circuit or district judge shall be required  
4 to entertain an application for a writ of habeas corpus  
5 to inquire into the detention of a person pursuant to a  
6 judgment of a court of the United States if it appears  
7 that the legality of such detention has been determined  
8 by a judge or court of the United States on a prior  
9 application for a writ of habeas corpus, except as  
10 provided in §2255.

11                 (b) (1) A claim presented in a second or successive  
12 habeas corpus application under section 2254 that was  
13 presented in a prior application shall be dismissed.

14                 (2) A claim presented in a second or successive  
15 habeas corpus application under section 2254 that was  
16 not presented in a prior application shall be dismissed  
17 unless--

18                     (A) the applicant shows that the claim relies on a  
19 new rule of constitutional law, made retroactive to  
20 cases on collateral review by the Supreme Court, that  
21 was previously unavailable; or

22                     (B) (i) the factual predicate for the claim could  
23 not have been discovered previously through the exercise  
24 of due diligence; and

25                     (ii) the facts underlying the claim, if proven and  
26 viewed in light of the evidence as a whole, would be  
27 sufficient to establish by clear and convincing evidence  
28 that, but for constitutional error, no reasonable fact  
finder would have found the applicant guilty of the  
underlying offense.

29                 (3) (A) Before a second or successive application  
30 permitted by this section is filed in the district  
31 court, the applicant shall move in the appropriate court  
32 of appeals for an order authorizing the district court  
33 to consider the application.

34                 (B) A motion in the court of appeals for an order  
35 authorizing the district court to consider a second or  
36 successive application shall be determined by a three-  
37 judge panel of the court of appeals.

38                 (C) The court of appeals may authorize the filing  
39 of a second or successive application only if it  
40 determines that the application makes a prima facie  
41 showing that the application satisfies the requirements

1 of this subsection.

2 (D) The court of appeals shall grant or deny the  
3 authorization to file a second or successive application  
not later than 30 days after the filing of the motion.

4 (E) The grant or denial of an authorization by a  
5 court of appeals to file a second or successive  
application shall not be appealable and shall not be the  
subject of a Petition for Rehearing or for a Writ of  
Certiorari.

7 (4) A district court shall dismiss any claim  
8 presented in a second or successive application that the  
court of appeals has authorized to be filed unless the  
9 applicant shows that the claim satisfies the  
requirements of this section. 28 U.S.C. § 2244.

10 28 U.S.C. § 2244(b)(3) "creates a 'gatekeeping' mechanism for  
11 the consideration of second or successive applications in district  
12 court. The prospective applicant must file in the court of  
13 appeals a motion for leave to file a second or successive habeas  
14 application in the district court. § 2244(b)(3)(A)." Felker v.  
15 Turpin, 518 U.S. 651, 657 (1996).

17 The instant Petition and the prior habeas action both  
18 challenge Petitioner's custody pursuant to the same 2012 judgment  
19 entered by the Los Angeles County Superior Court. Accordingly,  
20 the instant Petition, filed on April 9, 2018, is a second or  
21 successive habeas petition for purposes of 28 U.S.C. § 2244.  
22 Therefore, Petitioner was required to obtain authorization from  
23 the Court of Appeals before filing the present Petition. See 28  
24 U.S.C. §2244(b)(3)(A). No such authorization has been obtained  
25 in this case.

Moreover, the claims asserted in the instant Petition do not appear to fall within the exceptions to the bar on second or successive petitions because the asserted claims are not based on newly discovered facts or a "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Tyler v. Cain, 533 U.S. 656, 662 (2001). However, this determination must be made by the United States Court of Appeals upon a petitioner's motion for an order authorizing the district court to consider his second or successive petition. 28 U.S.C. § 2244(b); see also Burton v. Stewart, 549 U.S. 147, 157 (2007) (where the petitioner did not receive authorization from the Court of Appeals before filing second or successive petition, "the District Court was without jurisdiction to entertain [the petition]"); Barapind v. Reno, 225 F.3d 1100, 1111 (9th Cir. 2000) ("[T]he prior-appellate-review mechanism set forth in § 2244(b) requires the permission of the court of appeals before 'a second or successive habeas application under § 2254' may be commenced."). Because Petitioner has not obtained authorization from the Ninth Circuit Court of Appeals, this Court cannot entertain the present Petition. See Burton v. Stewart, supra.

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## ORDER

3           Accordingly, IT IS ORDERED that the Petition be dismissed  
4 without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: April 26, 2018

Jay Klaasen

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R. GARY KLAUSNER  
UNITED STATES DISTRICT JUDGE